

# **INTERNATIONAL BAR ASSOCIATION**

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**When money disappears – response, recovery and regulation**

**Civil pursuit of the criminal defendant: an overview of Swiss law**

## 1. Introduction

Switzerland is a Federal State made up of 26 Cantons. In accordance with the Federal Constitution, substantive civil and criminal law are part of Federal law, whereas matters of procedure as well as the organization of the court system are regulated by the Cantons with the exception of the organization of the Federal Court in Lausanne (and more recently the Federal Penal Court in Bellinzona).

Most civil and criminal cases are initiated in the Cantonal courts with the possibility of an ultimate appeal (or a more limited judicial review) by the Federal Court in Lausanne which is in effect the Supreme Court of Switzerland. One of the main functions of the Federal Court is to ensure a uniform application of Federal law, and in particular of substantive civil and criminal law, by the Cantonal courts. Nevertheless, court practices may vary to some extent from one Canton to another.

## 2. Causes of civil action related to unlawful conduct

- 2.1 Most actions brought by victims of unlawful conduct are based on the Swiss Federal Code of Obligations (SFCO) relating to tort and unjust enrichment. If a tort also constitutes a breach of contract, the plaintiff may rely on both causes of action.
- 2.2 Tort is defined under Art. 41 SFCO as a liability for damages incurred by whoever unlawfully causes damage to another, whether wilfully or negligently. A claim under Art. 41 SFCO requires (1) an unlawful act, (2) a damage, (3) a nexus between the unlawful act and the damage and (4) a fault, i.e. intentional or negligent misconduct.

Damage includes actual loss and lost income but the tortfeasor is required to compensate any form of damage incurred by the plaintiff provided his claim is successful and sufficient evidence of quantum is furnished.

Damage can be recovered only for the harm caused by the tortfeasor's conduct. Under the theory of so-called adequate causation applied by the Swiss courts, an act or event is deemed to cause harm to the plaintiff if, in accordance with everyday experience, such an act or event normally leads to the type of harm that has occurred in the case under review.<sup>1</sup>

The tortfeasor's misconduct may be intentional or negligent. Negligence arises from the lack of due diligence which should have been necessary to prevent the damage from occurring which could have been (reasonably) expected from the tortfeasor. Swiss courts apply an objective standard to ascertain

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<sup>1</sup> For a fuller description, see Martin Bernet, International Commercial Fraud, First Edition, General Editors Robert Goldspink and Jeremy Cole, Vol. 2, chapter 20 (Switzerland), more particularly Section 20-05.

negligence, i.e. the court will compare the tortfeasor's conduct with the conduct of a reasonable person under similar circumstances.

- 2.3 Unjust enrichment requires (1) an enrichment of the defendant, (2) an impoverishment of the plaintiff, (3) a nexus between the defendant's enrichment and the plaintiff's impoverishment and (4) the absence of a legitimate legal ground for the enrichment.

Unjust enrichment is deemed to occur in the following circumstances:

- a payment is made pursuant to a contract that is void;
- a payment is made pursuant to a condition that does not materialize;
- a payment is made pursuant to a contract that is subsequently voided (for instance because the plaintiff has successfully challenged a contract tainted by fraud).

- 2.4 The Swiss legal system follows the civil law tradition and does not operate any distinction between legal ownership and equitable or beneficial ownership. Swiss law only recognizes legal ownership and will not support proprietary claims that are based on an alleged beneficial ownership of assets. Any payment by way of entries on bank accounts entails a loss of ownership. Bank account balances are debts arising from the contractual relationship between the bank and the customer.

- 2.5 Swiss law sets a high threshold for piercing the corporate veil in civil claims by requiring (1) that the economic identity between the defendant and the corporate identity is apparent and indisputable and (2) the defendant is relying abusively on the legal duality,

for instance for the purpose of avoiding enforcement proceedings.<sup>2</sup>

The statute of limitations for tort claims is of one year, starting when the injured party has identified the person liable in tort and has obtained sufficient knowledge of the damage incurred as a result of the tort. In any event, tort claims are time-barred 10 years after the date of perpetration of the tort. If the tort also constitutes a criminal offence, the longer statute of limitations of criminal law will apply to the civil tort claim.

### 3. Disclosure of evidence

Swiss law does not provide for pre-trial discovery or disclosure in civil cases. Under the general rule of Art. 8 of the Swiss Civil Code, a party bringing a civil or commercial case is required to provide evidence of the facts supporting his claim. As Swiss law now stands, there is no obligation for the defendant to spontaneously provide evidence that will assist the plaintiff's case, or even to inform the plaintiff of the existence of such evidence. This is often perceived as a shortcoming in the Swiss civil claim adjudication process.

However, in a number of instances, Swiss Federal Law (that regulates substantive civil law) provides for specific duties of disclosure of evidence, for example in the following situations:

- the Landlord is required to provide the Tenant with evidence of charges and expenses included in the rent (Art. 257b Section 2 SFCO);
- the Employer is required to provide his Employee with all requisite information regarding the Employee's agreed

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<sup>2</sup> Official Report of the Decisions of the Swiss Federal Tribunal, Vol 102 (1976) I 165

participation to the profits or the turnover of the Employer (Art. 322a Section 2 and 322c Section 2 SFCO);

- the Agent has the duty to provide the Principal with full particulars of his management of the Principal's affairs (Art. 400 Section 1 SFCO);

- Partners have the right to be informed of the conduct of the Partnership's business (Art. 541 and 557 Section 2 SFCO);

- The Shareholder of a limited liability company is entitled to consult the accounts and correspondence subject to the proper safeguard of business secrets (Art. 697 Section 3 SFCO);

- Significantly, Art. 963 SFCO provides that any person or company required by law to hold accounts must produce accounts, commercial correspondence and accounting records in claims involving the business, provided that the plaintiff can show an "*interest worthy of protection*". It is not relevant that the business is a party or not to the civil proceedings, provided that there is a sufficient link between the business and those proceedings.

A number of Cantons have empowered civil courts to order a party to produce documentary evidence in that party's possession that is relevant to the dispute (see for instance Art. 186 Section 2 of the Law of Civil Procedure of the Canton of Geneva). However, this limited duty of disclosure is subject to a number of requirements: the document must be deemed relevant to the dispute, the party claiming production of the document must have no other means of obtaining it, the document must be effectively in the other party's possession and that party should not be in a position to raise legitimate grounds to refuse the production of the document such as professional privilege or business secrets. Even more

significantly, most Cantons have not imposed a duty of production on third parties. Two notable exceptions are the Cantons of Zurich (Art. 184 of the Code of Civil Procedure of Zurich) and the Canton of Vaud (Art. 179 of the Code of Civil Procedure of Vaud).<sup>3</sup>

Public information is available from State-run Registers such as the Commercial Register and the Land Register. The Commercial Register provides essential information on the business, i.e. the name of the company, its address, its business organization, its share capital, articles of incorporation, names of officers and of persons holding signing authority. However, the commercial register does not give any information on the shareholders or on the financial status of the business. The Land Register contains information on every piece of real estate in Switzerland, i.e. information on ownership, liens, mortgages and their beneficiaries.

Court proceedings are deemed confidential and court files are not accessible to the public (subject to publicity of hearings in accordance with the requirements of Art. 6 of the European Convention on Human Rights).

#### 4. Jurisdiction of the Swiss Court and applicable law in international civil and commercial cases

Switzerland is a party to the Lugano Convention on Jurisdiction and the enforcement of judgements in civil and commercial matters of September 16, 1988 (Lugano Convention).

In respect of all countries that are not parties to the Lugano Convention, the Swiss courts will apply an important body of Swiss domestic law referred to as the Federal Act on Private International Law of December 18,

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<sup>3</sup> For further discussion of these issues and comparison with discovery / disclosure in the United Kingdom and the United States, see Nicolas Jeandin, *LPC et production de pièces de lege ferenda in Semaine judiciaire 2000*, p. 373 ff).

1987, (PILA).

In matters of tort, the injured party may bring an action at the place in Switzerland where the unlawful act has been committed or alternatively where the injury arising from that act has occurred (Art. 129 Section 2 PILA).

In the absence of international conventions binding Switzerland (such as the Lugano Convention), PILA regulates the law applicable to tort claims, i.e:

- if the tortfeasor and the injured party have their usual residence in the same State, the law of that State applies (Art. 133 Section 1 PILA);

- if they have their usual residence in different States, the law of the State where the tort was committed applies provided that the unlawful act and the injury occurred in the same jurisdiction (Art. 133 Section 2 PILA);

- if the harmful effect occurred in a State other than the State in which the tort was committed, the Swiss court will apply the law of the jurisdiction in which the harmful effect has arisen, provided that the tortfeasor should have foreseen that the harmful effect would occur there (Art. 133 Section 2 PILA).

In respect of claims arising from unjust enrichment, PILA provides that:

- claims are governed by the law which governs the legal relationship in respect of which the enrichment has occurred (Art. 128 Section 1 PILA);

- in the absence of such a relationship, the claims are determined in accordance with the law of the State in which the enrichment has occurred (Art. 128 Section 2 PILA).

## 5. Service of proceedings

Service of proceedings is a sovereign act under Swiss law and cannot be processed privately. Such service would be ineffective and could also expose the persons involved in criminal sanctions under Art. 271 of the Swiss Penal Code.

Switzerland is a party to the relevant Hague Conventions, including the Convention on the Service abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters of 15 November 1965 (the Hague Service Convention). Switzerland has explicitly declared that it will not allow service by mail. In addition, formal service in accordance with Art. 5 section 1 of the Hague Convention will be carried out only if the documents to be served are translated in the official language of the Canton in question (i.e. German, French or Italian).

Process of service is effected by a Central Authority designated by each Canton.

## 6. Civil attachment of assets

Civil attachments are regulated by Art. 271-281 of the Federal Act on Debt Collection and Bankruptcy of 11 April 1889 as amended on 1 January 1997 (DCBA). The following requirements have to be met:

- the applicant must show *prima facie* evidence that the claim has a reasonable chance of succeeding on its merits;
- the applicant must provide *prima facie* evidence that the debtor owns assets within the jurisdiction of the Swiss court;

- the applicant must show the existence of one of the legal grounds for attachment listed in Art. 271 DCBA. The most significant ground is the absence of a domicile of the debtor in Switzerland; in this case, unless there are other grounds for attachment, the debt must have a sufficient link with Switzerland or must arise from an enforceable judgment or a written acknowledgement of debt.

The “close connection” test was introduced in 1997 in an effort to raise the legal threshold for obtaining attachment orders. Case law has determined that a “sufficient link” is deemed to exist in the following situations:

- the contract was negotiated, reached or performed in Switzerland;
- the parties have agreed to apply Swiss law;
- the parties have agreed that the seat of the arbitration tribunal shall be in Switzerland;
- the plaintiff has his residence in Switzerland;
- the tortious act was committed in Switzerland.

In the event that an attachment order is granted, the creditor is required to take specific action within 10 days to initiate legal proceedings on the merits of the claim raised against the debtor, unless such proceedings are already pending.

Civil attachment orders are granted in *ex parte* proceedings. Once the debtor has received notice of the order, he may seek to have it discharged by the court in *inter partes* proceedings.

The attachment order is limited to the assets located in Switzerland and, contrary to English style Freezing Injunctions, the civil attachment is purely an *in rem* remedy limited to assets identified by the creditor and located in Switzerland. There is no possibility under Swiss law to

obtain an order from the court enjoining the debtor from disposing of other assets.

As soon as the attachment order is final, the bank holding the attached funds is under an obligation to disclose all relevant information concerning those funds. However, there is no means of compelling the bank to provide this information. The practice of many banks is to indicate whether or not any assets have been attached without giving further information in the absence of an enforceable judgement. Pursuant to the ratification of the Lugano Convention, Swiss courts have to decline jurisdiction over a debtor domiciled in a country that has ratified the Convention, which arises purely out of an attachment order granted on the debtors' assets located in Switzerland (*forum arresti*).

#### 7. Recognition and enforcement of judgments in civil and commercial matters

Judgments issued by courts of the member States of the Lugano Convention are recognized and enforced in accordance with Art. 25 to 49 of that Convention whereas judgments from other States are recognized and enforced pursuant to Art. 25 to 32 PILA.

Under Art. 25 PILA, a foreign decision shall be recognized in Switzerland if (1) the judicial or administrative authorities of the State in which the decision was rendered had jurisdiction, (2) the foreign decision must be final (i.e. no further suspensive appeal can be lodged) and (3) there are no grounds for refusal under Art. 27 PILA (which safeguards Swiss public policy).

It is now clear that foreign provisional measures can be recognized and enforced in Switzerland under the Lugano Convention. Regarding an English worldwide Freezing Injunction, the Federal Tribunal (i.e. Switzerland's

Supreme Court) has recently upheld decisions of the Zurich Court of Appeals recognizing and enforcing an English worldwide Freezing Injunction<sup>4</sup>. Interestingly, the Federal Tribunal drew upon the case law of the European Court of Justice (ECJ), particularly the decision of the ECJ in *Denilauwer v. Couchet Frères*<sup>5</sup> whereby judicial decisions authorizing provisional or protective measures cannot be recognized and enforced under the terms of the Brussels Convention if they were taken without the debtor having the opportunity to be heard by the Court or if they are enforceable without having been duly served on the debtor. In the case of *Uzan v. Motorola*, the Federal Tribunal ruled that a declaration of enforceability is admissible even if the party affected by that declaration did not have an opportunity to challenge the proceedings until after the decision had already been issued. The right to a fair hearing is therefore not violated if it is granted *ex post*<sup>6</sup>. Outside the Lugano Convention, there is little reliable practice with regard to the recognition of interim measures in Switzerland and the possibility of obtaining such relief under PILA is still a controversial issue.<sup>7</sup>

A remedy that must not be overlooked is the possibility for the creditor seeking to enforce a judgment under the Lugano Convention to request protective measures against the judgment debtor (Art. 39 of the Lugano Convention). This remedy goes beyond the ordinary attachment order (granted under Art. 271 DCBA), since it enables the creditor to obtain the freezing of assets of the Swiss debtor.

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<sup>4</sup> Official Reporter of Decisions of the Swiss Federal Tribunal Vol. 129 III 626, *Uzan v. Motorola*.

<sup>5</sup> Case C-125 / 79 (1980) ECR 15-53

<sup>6</sup> For further discussion of this decision, see Mark Veit and Thom Sprange, *Enforcing English Worldwide Freezing Injunctions in Switzerland* in *Business Law International*, Vol. 5, n° 3, September 2004, p. 400 ff.

<sup>7</sup> Martin Bernet, *loc. cit supra* Note 1 ad section 20-50

## 7. Obtaining evidence in aid of foreign civil proceedings

Switzerland has ratified the Hague Convention on the taking of evidence brought in civil and commercial matters in 18 March 1970 (The Hague Evidence Convention).

Evidence can be provided through diplomatic officers, consular agents and commissioners in accordance with the Hague Evidence Convention. Attorneys in private practice are allowed to act as commissioners, provided that prior approval is given by the Federal Ministry of Justice and Police.

Although discovery is not admissible under Swiss domestic law, Switzerland agrees to accept requests for pre-trial discovery of documents under a number of strict conditions designed to prevent fishing expeditions.

Outside the Hague Evidence Convention, evidence has to be obtained in Switzerland through the classical process of letters rogatory.

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